

DISCLAIMER

This electronic version of an SCC order is for informational purposes only and is not an official document of the Commission. An official copy may be obtained from the [Clerk of the Commission, Document Control Center](#).

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

v.

CASE NO. PUE980628

AUBON WATER COMPANY,

Defendant

FINAL REPORT OF MICHAEL D. THOMAS, HEARING EXAMINER

February 22, 2001

On December 16, 1998, the Commission entered an Order of Settlement against Aubon Water Company ("Aubon"). The Order required Aubon to construct a water treatment facility to serve the Long Island Estates subdivision located on Smith Mountain Lake in Franklin County, Virginia. The Order further provided that the Commission would retain jurisdiction over the matter until further order.

In a companion case, Case No. PUE990002, the Commission approved a rate increase which included revenues designed to recover the cost of constructing the water treatment facility. The Commission required Aubon to establish an escrow account to be used solely for the payment of expenses related to the construction, operation, and maintenance of the facility. The Commission further required Aubon to deposit into that escrow account the additional revenues it approved to pay off a ten-year loan, which Aubon had not yet obtained, for construction of the facility. If Aubon failed to obtain financing within eight months of the effective date of the Commission's Final Order, Aubon was ordered to: (1) file an application for a rate decrease that eliminated the revenues associated with the water treatment facility; and (2) place into effect the individual rates recommended by the Staff in the case, on an interim basis.

As set forth in greater detail in the Settlement Progress Report entered by this Hearing Examiner on May 1, 2000, Aubon was unable to obtain construction financing from its bank for the water treatment facility. Financing was denied in part because the Town of Rocky Mount annexed a portion of Franklin County that included Aubon's Franklin Heights water system. As part of the annexation, the Town of Rocky Mount agreed to provide municipal water and sewer service to the areas it annexed, including the Franklin Heights subdivision. Aubon's bank refused to loan it any money for the construction of the facility until Aubon resolved the issue of the possible loss of revenue from its Franklin Heights water system.

By Order entered on May 26, 2000, the Commission extended the date by which Aubon had to secure financing for the construction of the water treatment facility from August 17, 2000, to December 31, 2000.

On November 6, 2000, a hearing was held to determine two key issues which had delayed the construction of the water treatment facility. The first involved the approval of the final plans

and specifications for the water treatment facility. A representative of the Department of Health, Office of Water Programs (“VDH-OWP”) testified his office had received everything it needed from Aubon to consider approval of the final plans and specifications. The second issue involved the possible purchase of Aubon by Petrus Environmental Services, Inc. (“Petrus Environmental”). Mr. David Petrus testified his company entered into an Intent Agreement with Aubon to purchase the water company. Mr. Petrus testified he was in the process of negotiating the terms of a possible sale of the Franklin Heights water system to the Town of Rocky Mount, or some other arrangement that would provide sufficient revenues to make the purchase of Aubon financially viable.

The sale of the water company to Petrus Environmental represented the last chance for the homeowners in Long Island Estates to have a water treatment facility built to serve their subdivision. Aubon is financially incapable of completing the project and complying with the Commission’s Order of Settlement. Petrus Environmental, however, has sufficient working capital to construct the water treatment facility without borrowing funds.

For the reasons set forth in his Second Settlement Progress Report entered on December 8, 2000, this Examiner recommended, among other things, that the Commission further extend its deadline for Aubon to obtain financing for the water treatment facility to March 1, 2001.

By order entered on December 19, 2000, the Commission granted Aubon an extension through and including March 1, 2001, to secure financing for the construction of the water treatment facility.

On February 20, 2001, the Staff filed a memorandum with the Clerk of the Commission outlining the events that have occurred since the Commission granted Aubon the latest extension to secure construction financing. Petrus Environmental was unable to negotiate a settlement with the Town of Rocky Mount that provided adequate compensation for the loss of Franklin Heights from Aubon’s water system. Petrus Environmental, therefore, declined to proceed with its acquisition of Aubon. Aubon’s president then filed a letter requesting the Commission’s assistance in protecting the company’s Franklin Heights service territory from being taken by the Town of Rocky Mount without reasonable compensation. Subsequent to this correspondence, Aubon’s president indicated to the Commission’s Division of Energy Regulation (the “Staff”) that he would be amenable to placing Aubon in receivership.

DISCUSSION

There comes a time in every case when you have to face the facts, no matter how unpleasant they may be. In this case, it is now abundantly clear that the water treatment facility for the Long Island Estates subdivision will not be built, at least not by Aubon or by any other water company. Since Petrus Environmental failed to reach favorable terms with the Town of Rocky Mount for the sale of the Aubon’s Franklin Heights water system, it decided not to pursue its option to purchase Aubon. There is no other water company interested in purchasing Aubon and installing the water treatment facility for the Long Island Estates subdivision, and there are no other sources of financing available for Aubon to secure construction lending for the project.

The annexation of the Franklin Heights subdivision by the Town of Rocky Mount has hung like a black cloud over this entire case. The annexation precipitated Aubon's bank to condition the loan for the water treatment facility. Aubon was able to satisfy the first condition, that the Commission approve the company's requested rate increase to cover the cost of financing the construction of the water treatment facility, but was unable to satisfy the second condition. Aubon was unable to reach an agreement with the Town of Rocky Mount that would allow it to continue providing service to Franklin Heights for the ten-year life of the loan, or an agreement for the sale of the Franklin Heights water system to the Town for an amount that was at least equal to, or greater than, the amount of the loan. Petrus Environmental was just as unsuccessful in its negotiations with the Town. Aubon does not have the financial resources to defend its Commission-issued certificate of public convenience and necessity against a taking of a valuable property right.

Where does this leave Aubon's customers? If the Town of Rocky Mount takes Aubon's Franklin Heights service territory without adequately compensating the company, then the water treatment facility will not be built, and it will most likely mean the demise of the Aubon Water Company. It does not appear likely that the Town will adequately compensate either Aubon or Petrus Environmental, if it purchased Aubon, for the loss of the Franklin Heights water system. If the Town proceeds on its present course of action, the two remaining water systems that comprise Aubon, Long Island Estates and Alton Park, would not form a viable water company. This past summer the well in the Alton Park subdivision failed and Aubon was forced to truck water to the subdivision to meet customer demand. Aubon has neither the cash nor the working capital to pay the short-term costs of trucking water to the subdivision, or the long-term costs of installing a new well, pump house and storage tank. Basically, what this means for the company's customers is that Aubon will continue to provide inadequate water service to its two remaining subdivisions until it either runs out of cash and declares bankruptcy, or the owner turns the keys to the company over to the Commission or the VDH-OWP after the company is hopelessly insolvent.

I find that the best interests of the company's customers would be served by the initiation of a receivership proceeding, pursuant to § 56-265.13:6.1 of the Code of Virginia, sooner rather than later. Aubon's president has indicated to the Staff that he is amenable to a voluntary receivership. Perhaps the Receiver may have greater success in negotiating a settlement with the Town of Rocky Mount, filing an application for an emergency rate increase to cover the short- and long-term costs of supplying water to Alton Park, or defending the company's certificate of public convenience and necessity. This, of course, depends a great deal on whom the Commission appoints as the Receiver.

Section 56-265.13:6.1 A of the Code of Virginia provides that:

The Commission may, either upon petition of two-thirds of the affected customers or upon petition of its staff or upon petition of the Board of Health, appoint a receiver to operate a small water or sewer utility which is unable or unwilling to provide adequate service to its customers. The utility shall be deemed to be unable or unwilling to provide adequate service if the Commission finds, after notice to the utility and the Department of Health and hearing, that:

1. The utility has failed to supply water or sewer service to a majority of the consumers for five days or more during the preceding three

months for reasons within the control of the water and sewer utility;
or

2. The Department of Health has certified that the utility has not met Department standards regarding the provision of an adequate quality or quantity of public drinking water and the Department of Health has found that the utility is unwilling to take action to meet these standards; or
3. The utility is grossly mismanaged; or
4. The utility has failed to comply with an order of the Commission to provide adequate service to the customers.

Upon appointment, the receiver shall take possession of the assets of the utility and operate them in the best interests of the customers. Control of and responsibility for the utility shall remain in the receiver until the utility can, in the best interests of customers, be returned to the original owners, transferred to new owners, or liquidated, whichever the Commission may determine to be in the public interest.

Based on the evidence in this case, it appears there may be sufficient grounds under subsections 2, 3 or 4 to place the company into receivership. Aubon has failed to comply with the Special Order issued by the Virginia Department of Health requiring the company to comply with its regulations. Aubon's management has failed to make adequate financial arrangements to meet unexpected contingencies that jeopardize the provision of adequate service to its customers, such as failing to repair the well at the company's Alton Park water system. Finally, Aubon has failed to comply with the Commission's Order of Settlement. Of course, the Staff would need to develop this evidence in the receivership proceeding before the Commission.

The Commission should further extend the deadline for Aubon to obtain financing for the water treatment facility until such time as the Receiver files his report and recommendations to the Commission regarding the ultimate disposition of the company. If the Receiver is successful in his negotiations with the Town of Rocky Mount, there is still a possibility the water treatment facility could be built, and the company would need the additional revenues to pay off any construction financing.

Accordingly, **I RECOMMEND** that the Commission direct its Staff to file a petition pursuant to § 56-265.13:6.1 of the Code of Virginia to initiate receivership proceedings against Aubon. **I FURTHER RECOMMEND** that the Commission extend the deadline for Aubon to obtain financing for the water treatment facility until such time as the Receiver files his report and recommendations to the Commission regarding the ultimate disposition of the company.

COMMENTS

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and Commission Rule 5:16(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within five (5) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.

Respectfully submitted,

Michael D. Thomas
Hearing Examiner